In the Supreme Court of the United States

OCTOBER TERM 1976

NO. 76-1064

FRANCOIS ROSSI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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The petitioner Francois Rossi respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 11, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto attached (App. A). No opinion was rendered by the United States District Court for the Eastern District of New York.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 11, 1976. A timely petition for rehearing was denied on January 3, 1977 (App. B) and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Whether Rule 404(b) of the Rules of Evidence for United States Courts and Magistrates continued the common law exclusionary rule restricting admissibility of evidence of other crimes wrongs or acts subject to limited and narrow exceptions or instead adopts the minority inclusionary rule of the Second Circuit admitting such evidence unless it is solely probative of supposed criminal character.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28, Rules of Evidence For United States Courts and Magistrates:

Rule 404(b):

> *Other crimes, wrongs, or acts.*— Evidence of other crimes wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 403:

> *Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.* — Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

On October 16, 1972 petitioner was indicted on a charge of conspiring to import narcotics between January 1969 and September 1972 in violation of §§ 173 and 174 of Title 21, United States Code. On February 10, 1973, he was arrested in Spain and subsequently extradited and delivered to United States authority.

On February 15, 1973, petitioner was indicted on a charge of conspiracy to violate federal narcotics importation laws (21 U.S.C. §§ 173, 174) between January 1, 1965 and May 1, 1971. After pleading not guilty to the charge in the latter indictment, he was tried by jury in the United States District Court for the Eastern District of New York, the Honorable Jacob Mishler, Chief Judge, presiding. On January 14, 1976 the jury returned a verdict of guilty. Petitioner was sentenced to twenty years' imprisonment. On November 17, 1976, the Court of Appeals affirmed this judgment.

The government's case in chief commenced with the testimony of alleged co-conspirator, Michel Nicoli, alias Ricardo Spuncle, Maurice Rosen, Miguel Doscentos, Maximo Demaggi, Carlos Calucci Silvera, and Antonio Vasquez. Nicoli's long testimony established his own extensive traffic in illegal narcotics importation from early in 1965 until his arrest in Sao Paolo, Brazil in October 1972. By his own testimony, Nicoli was responsible for the importation of hundreds of thousands of dollars worth of narcotic drugs into the United States. On the stand he testified to trips made in the years 1965 through 1967, where allegedly he, petitioner and Francois Chiappe purchased and imported heroin from France, through Buenos Aires, to the United States. According to Nicoli, Chiappe's primary function was to supply the money, while he and the petitioner acted as merchant-couriers. Nicoli testified to the increased use, as business expanded, of additional couriers and the establishment of a new route through Canada.

In 1968, the nature of the activity changed slightly. It no longer was necessary for the alleged conspirators to leave the United States. Instead, they arranged with Paul Paganacci to purchase heroin in Texas for re-sale in New York, thus eliminating the hazard of importation. Nicoli testified that, in addition to Paganacci, two new partners were acquired, Jean and Vincent Colonna. The amounts dealt in were increased in size, now that the problems of importation were diminished. The first deal was for 40 kilograms of heroin. Further trips followed in November 1968 (80 kilograms), March 1969 (40 kilograms), August 1969 (100 kilograms), December 1969 (60 kilograms), May 1970 (60 kilograms), and January 1971 (60 kilograms). The transaction of January 1971 was the last one Nicoli testified to. He was arrested by Brazilian police on October 4, 1972 and expelled to the United States on November 16, 1972.

In his testimony, Nicoli named more than a dozen individuals he said were involved in the narcotics transactions; he admitted his own extensive involvement in planning, purchasing, transporting and selling drugs; and he revealed his elaborate reliance on false passports and documents and his various sources for obtaining these papers, including another government witness, Jose Maniero-Ventoso. Nicoli attempted to implicate petitioner in every transaction in which he himself was involved.

Nicoli admitted to extensive torture by the Brazilian police and to his refusal to reveal any information to them. He admitted to reluctant cooperation with the United States government and testified that many of

his statements were deliberate lies, made as part of a plan to harm as few of his friends as possible and to aid himself. After pleading guilty to three separate indictments, part of his arrangement with the American government, Nicoli obtained a minimum three-year sentence, and served total time of approximately one and one-half years' incarceration. In addition, he was given an unsupervised five-year parole, financial assistance for living and rent, importation of and permission to marry his common-law wife, and the expectation of permanent United States residence for himself, his wife, and his child.

The Government's second witness, John Ravenello, was a Division Inspector of the French National Police. He testified to his surveillance of Pierre Marsot and Pierre Gheissen in February 1966. As a result of that surveillance, he arrested them and a sailor, Joseph Alphonsi, aboard a boat in LeHavre Harbor and confiscated what he identified as nine kilograms of heroin.

The next prosecuting witness, whose identity was revealed to the defense only two days before he was called to the stand, was Jose Manuel Maniero-Ventoso. Maniero testified that during 1966 and 1967 he obtained false Uruguayan identity cards for Francois Chiappe, Miguel De Santos (Nicoli) and Marcello Gaspari, whom he identified as the petitioner Rossi. He himself served four months in jail in Uruguay for his activities in obtaining false papers. By his testimony, he attempted to place himself in the position of an honest man, merely seeking to help others in need of legitimate papers — testimony which was brought into question by the prose-

cution's star witness Nicoli, who stated that Maniero was well aware that the documents he was obtaining were false.

The next three government witnesses were members of the Royal Canadian Mounted Police. Andre Pouliot testified to the arrest of Andrea Settembre and Giuseppe Quartano at Dorval Airport, Quebec, on December 13, 1967, in possession of ten and eight bags of white powder, respectively. Leo Daigh testified to the arrest of Carmine Russo on the same day at the Queen Elizabeth Hotel in Montreal and the confiscation of eight bags containing white powder. Gaston McDuff testified to performing the Marquis-reagent test on samples from each confiscation and his determination that each was heroin.

Joseph Sena, an investigator for the United States Immigration and Naturalization Service, New York City, appeared to explain the forms used by the Department and to introduce immigration form 1-94 from a departing flight of Argentine Airlines from New York, dated April 20, 1968 in the name of Vasquez but containing irregularities in its coding, pointing to the use by a different individual.

The last prosecution witness, Dominick Mingiane, an employee of the Drug Enforcement Administration, testified to the arrest of petitioner Rossi on February 9, 1973 in Barcelona, Spain, and over strong objections from the defense was allowed to introduce money and papers seized from the apartment outside of which petitioner was arrested.

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION

The U. S. Court of Appeals for the Second Circuit freely admits evidence of other crimes, wrongs and acts upon any conceivable evidentiary predicate unless the *only* probative value of the evidence is to characterize the accused (or other discredited individual) as a "bad man." Other Courts of Appeal adhere to the common law exclusionary rule which restricts admission of evidence which tends to suggest that the accused is of criminal character and therefore must be guilty of the crime charged. This conflict between the so-called "inclusionary" and "exclusionary" rules persists even after passage of the Rules of Evidence for U. S. Courts and Magistrates which were intended to serve as uniform rules throughout the Country.

II.

PETITIONER WAS DENIED DUE PROCESS BY THE ADMISSION INTO EVIDENCE OF HIGHLY PREJUDICIAL DOCUMENTS AND MONEY WHICH WERE OF NO PROBATIVE VALUE TO THE ISSUE ON TRIAL.

The prosecution put Dominick Mingiane, an agent of the Drug Enforcement Administration, on the stand for the purpose of testifying to the arrest of petitioner Francois Rossi in Spain in February 1973 and to introduce passports, documents and cash seized from the apartment outside of which he was arrested. Defense counsel vigor-

ously objected to the introduction of these materials seized two years after the termination of the conspiracy.* (Tr. 663-667). The Court overruled the defense objections and allowed the material into evidence, denying the defense's motion for a mistrial (Tr. 691) and its renewed objections.

The defense objected with great force because the material to be introduced was highly prejudicial by its very nature. The knowing possession of false documents is likely evidence of some criminal activity, and the fact that the defendant was in possession of false papers at the time of his arrest in 1973 might well convince a jury that he was a "bad man" bent on wrongdoing and therefore had also committed the acts at issue. *Compare, United States v. Goodwin*, 492 F.2d 1141, 1148-1155 (5th Cir. 1974). Likewise, the mere possession of $19,000 in cash, which actually proves nothing about a conspiracy which ended two years earlier, could leave a devastating impression on the minds of the jury. *Compare, Blumberg v. United States*, 222 F.2d 496, 500-501 (5th Cir. 1955).

Rule 404(b) of the Rules of Evidence for United States Courts and Magistrates excludes evidence of so-called "other crimes" except for limited purposes:

> Rule 404(b) *Other crimes, wrongs, or acts.*— Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity there-

*It should be observed that by the testimony of the prosecution's own witness, the evidence presented establishes the termination of the conspiracy in 1971. The government has never denied this assertion although it did argue below that the mere accusation of the later date in the indictment should overcome this problem of remoteness.

> with. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Moreover, Rule 403 of the evidence rules provides for the exclusion even of admissible evidence in order to avoid unfair prejudice:

> Rule 403. *Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.*—Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

These rules are designed to block the introduction of "other crimes" evidence which should not intrude upon a defendant's trial. Naturally such evidence of criminal character is highly damning; once brought to the jury's attention it simply cannot be erased. *See Marshall v. United States*, 360 U.S. 310 (1959) (*per curiam*). *See also, Burgett v. Texas*, 389 U.S. 109, 115 & n.7 (1968). The rules also are intended to avoid surprise, confusion and delay litigating "other crimes" problems surfacing at trial (and, significantly, not as a result of any Grand Jury finding).

In the instant case the admission of the documents and money could only be prejudicial to the petitioner. The prosecution never established the fact that the money belonged to him. It was found at an unspecified location in the apartment outside of which petitioner was arrested,

an apartment which was also occupied by another individual who may have been the owner of this cache (Tr. 723). *Compare, United States v. Clemons*, 503 F.2d 486, 488-491 (8th Cir. 1974). While the documents and passport appeared to belong to the petitioner, this mere possession does not prove conspiracy to violate narcotics importation laws—especially two years after the conspiracy involved ended. *Compare, United States v. San Martin*, 505 F.2d 918 (5th Cir. 1974). Thus, it was reversible error for the trial judge to admit this highly inflammatory evidence, in light of its minute probative value to the case at bar. Despite the legal irrelevance of this evidence, its practical effect would be to convince the jury that the petitioner must be a "bad man" connected with international contraband. Moreover, although the jury had good cause to reject the direct evidence testified to by Nicoli and even the circumstantial evidence of Maniero, the jury undoubtedly credited the testimony of the arresting DEA officer. Petitioner plainly was prejudiced by the introduction of this "other crimes" evidence and his conviction therefore should have been reversed. Rules 404(b) and 403, Rules of Evidence for United States Courts and Magistrates.

III.

THE SECOND CIRCUIT INCLUSIONARY RULE CONFLICTS WITH RULE 404(b) OF THE FEDERAL EVIDENCE CODE AND THE LAW OF NUMEROUS OTHER CIRCUITS AND RAISES IMPORTANT RECURRING QUESTIONS OF FEDERAL LAW

The evidence of other crimes, wrongs and acts would never have been admitted in other Circuits. The holding in

United States v. Clemons, 503 F.2d 486, 488-491 (8th Cir. 1974) plainly conflicts with the result herein which allowed the jurors to consider the cache of money even though it was not proven to belong to petitioner. The holding in *United States v. San Martin*, 505 F.2d 918 (5th Cir. 1974) plainly conflicts with the result herein which allowed the jurors to consider the documents and passport—not connected directly in any way to the case— possessed by petitioner two years after the conspiracy ended. Moreover, the difference is fundamental, affecting all trials at which such evidence is offerred.

In the Second Circuit the so-called "inclusionary" rule has prevailed. *E.g.*, *United States v. Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). Under this rule anything comes into evidence that the trial court can be persuaded has any relevance, despite the injection of other crimes into the case. This laxity is so routine that in the case at hand the Brief for Appellee at pp. 12-13 (App. C.) argued the admissibility of the inflammatory evidence seized on theories that it tended to corroborate the testimony of government witness Nicoli, could be viewed as instrumentalities of the crime and even that it was "circumstantial evidence of [petitioner's] narcotics enterprise." Worse, the Court of Appeals affirmed without even bothering to discuss the issue.

This case, however, was tried after passage of the Rules of Evidence for United States Courts and Magistrates. Rule 404(b) plainly codifies the majority common law rule of exclusion. *United States v. Burkhart*, 458 F.2d 201, 207 (10th Cir. 1972) (*en banc*). *See generally, United States v. San Martin*, 505 F.2d 918, 921 (5th Cir. 1974). Its structure and language are in the common law exclu-

sionary mold: the first sentence states the general rule that other crimes evidence is "not admissible" and then the second sentence states exceptions. Moreover, the Advisory Committee's Note relies on the authority of Slough & Knightly, *Other Vices, Other Crimes*, 41 Iowa L.Rev. 325 (1956). That article discusses the law entirely in exclusionary terms. If Congress had intended a significant departure from such tradition, it would certainly have spoken directly.

Other recent cases which demonstrate that the Second Circuit has not been phased at all by the federal evidence code include *United States v. Magnano*, 534 F.2d 431 (2d Cir. 1976) and *United States v. Hinton*, 543 F.2d 1002 (2d Cir. 1976). Second Circuit practitioners know this harsh truth.

Our conclusion is that the Second Circuit inclusionary rule and the result herein conflict directly with Rule 404(b) and with the case law in, at least, the Fifth, Eighth and Tenth Circuits. *United States v. San Martin, supra; United States v. Goodwin*, 492 F.2d 1141 (5th Cir. 1974); *United States v. Clemons, supra; United States v. Knight*, 534 F.2d 1059 (8th Cir. 1976); *United States v. Burkhart, supra.* Moreover other crimes problems surface commonly in federal criminal trials and raise important questions of fairness and judicial economy. Thus, even apart from the conflict, certiorari should be granted.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

(Opinion of the Court of Appeals)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 285 — September Term, 1976
(Argued September 30, 1976 Decided November 11, 1976.)
Docket No. 76-1234

UNITED STATES OF AMERICA,
Appellee,

v.

FRANCOIS ROSSI,
Defendant-Appellant.

Before:

FEINBERG, GURFEIN AND VAN GRAAFEILAND,
Circuit Judges.

Appeal from a judgment convicting appellant of conspiracy to traffic in heroin in violation of former § 174 of 21 U.S.C. after a jury trial in the United States District Court for the Eastern District of New York before Chief Judge Jacob Mishler.

JOSEPH BEELER, New York, N.Y. (Albert J. Krieger, New York, N.Y.; Donna R. Blaustein, Miami Beach, Florida, of Counsel), for Defendant-Appellant.

PETER R. SCHLAM, Assistant U.S. Attorney (David G. Trager, U.S. Attorney for the Eastern District of New York, of Counsel), for Appellee.

PER CURIAM:

On October 16, 1972, appellant was charged in indictment 72-CR-1162 issued in the United States District Court for the Eastern District of New York with conspiring to traffic in narcotics between January 1969 and September 1972. On February 13, 1973, the United States requested Spanish authorities to provisionally arrest appellant pending a formal request for his extradition. On February 15, 1973, a second indictment 73-CR-164, was issued in the Eastern District charging appellant with conspiring to traffic in narcotics between 1965 and the date of the indictment. The government then requested appellant's extradition from Spain. Although this request was based on indictment 73-CR-164, the order of the Spanish court directing extradition listed the dates of the conspiracy as running from January 1969 to September 1972, the period covered by indictment 72-CR-1162.

Appellant was tried and convicted under indictment 73-CR-164, and this is an appeal from that conviction Appellant asserts that the discrepancy between the dates contained in the order of extradition and those of indictment 73-CR-164 deprived the District Court of jurisdiction under the "principle of specialty" which restricts prosecution to the crime for which extradition was specifically granted United States v. Rauscher, 119 U.S. 407 (1886).

In United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962), the defendant was extradited from Lebanon on the basis of an indictment issued in the Southern District of New York charging him with narcotics trafficking in violation of former sections 173 and 174 of Title 21, U.S.C. but was tried on a subsequent indictment issued in the Eastern District which included two counts — receipt and concealment of heroin — not covered by the Southern District's indictment. We upheld the jurisdiction of the District Court in that case on the ground that the Lebanese would not consider "that [defendant] was tried for anything else but the offense for which he was extradited, namely, trafficking in narcotics". United States v. Parouian, supra, 299 F.2d at 491. We think the same reasoning is dispositive of appellant's contentions on this appeal.

Appellant's other assertions of error merit no discussion. The judgment of conviction is affirmed.

APPENDIX B

(Order Denying Petition for Rehearing)

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of January, one thousand nine hundred and seventy-seven.

No. 76-1234

Present:

HON. WILFRED FEINBERG
HON. MURRAY I. GURFEIN
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

FRANCOIS ROSSI, a/k/a "Marcello", Paul Paganacci, Francois Chiappe, Miguel Russo, Elio Gigante, Mariano Warden, Felice Bonetti, Cesar Melchiore, & John Doe, a/k/a "Dino",
Defendants,

FRANCOIS ROSSI, a/k/a "Marcello",
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, Francois Rossi, a/k/a "Marcello",

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

APPENDIX C

(Excerpt from Brief for the Appellee)

The false documents and cash seized incident to appellant's arrest were properly admitted as relevant evidence of appellant's narcotics activities.

Appellants argues that Chief Judge Mishler erred in admitting into evidence false documents and testimony about $19,000 in cash seized incident to appellant's arrest in Barcelona, Spain on February 9, 1973. We submit that Judge Mishler acted well within his discretion in admitting this evidence.

The false documents served several relevant purposes. First, they corroborated the testimony of Nicoli that appellant used false documents to further his narcotics business. Second, apart from Nicoli's testimony, the jury could find that Rossi used these false documents as instruments of his narcotics business, United States v. Ravich, 421 F.2d 1196 (2d Cir.), cert. denied, 400 U.S. 834 (1970). Evidence of the cash was also properly admitted as circumstantial evidence of appellant's narcotics enterprise. United States v. Schwartz, 2nd Cir. Slip Op. 3277 (decided April 20, 1976).

The indictment charged that the conspiracy continued up to the date of the filing of the indictment, February 15, 1973. The false documents and cash were seized on February 9, 1973. Therefore, appellant's contention that the seizure was too remote to be relevant is contrary to the facts.

Even if the conspiracy is deemed to have ended in 1971 when Nicoli's association with appellant ended, the evidence is nevertheless relevant and admissible as a similar act. The two-year lapse of time between the end of Nicoli's association with appellant and the seizure of the evidence goes to the weight to be given by the jury to the evidence and not to its admissibility. United States v. Tramunti, 513 F.2d 1087. (2d Cir.), cert. denied — U.S. —, 96 S.Ct. 55 (1975); United States v. Schwartz, supra at 3285.

Moreover, Judge Mishler, without objection by defense counsel, explained to the jury the use they could make of this evidence (704-06).